83-1289

NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

CHARLES BEN HOWELL,

Petitioner,

v.

STATE BAR OF TEXAS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Question One: Having decided on May 3, 1982 that petitioner had stated a meritorious claim to a federal forum, did the Fifth Circuit not err by deciding on August 1, 1983 that federal jurisdiction disappeared or was extinguished by the state judgment leaving the United States District Court without the constitutional power to hear this admittedly meritorious claim?

Question Two: Has the Fifth Circuit not confused between essential jurisdiction (the constitutional power of the federal court to act) and proper jurisdiction (propriety in the exercise of federal jurisdiction)? Does res judicata in this instance truly rise to jurisdictional proportions?

Question Three: If the interpretation placed thereon by the Fifth Circuit prevails, has not the *England* reservation mechanism been severely crippled if not effectively destroyed?

Question Four: Is there any legitimate basis for the Fifth Circuit's unembellished ruling that no *Pullman* abstention principles are present and *England* has no application to *Younger* abstention?

PARTIES

Charles Ben Howell, the sole petitioner, was the appellant and the plaintiff in the respective courts below. Respondents, appellees and defendants below were the State Bar of Texas, an agency of the State of Texas; Franklin Jones, Jr. and his successors in office, president thereof; and Jerry L. Zunker and his successors in office, general counsel thereof. The case was initiated in the United States District Court for the Northern District of Texas, Dallas Division, before the Hon. W. M. Taylor, Jr. on February 19, 1976; No. 3-76-0280. On appeal, it was docketed in the United States Court of Appeals for the Fifth Circuit as No. 81-1,069. The case name before this court was used in both courts below.

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OPINIONS BELOW

The original opinion of the Fifth Circuit (PA 9)[1], filed on May 3, 1982, 674F2d1027, was vacated by the Supreme Court (PA 19) for reconsideration in the light of *Dist. Col. Ct.* v. *Feldman*, 103SCT1303 (83). The subsequent opinion of the Fifth Circuit (PA 1), of which review is sought, was filed August 1, 1983; 710F2d 1075. The order denying rehearing (PA 8) was dated September 26, 1983; not to be published. The letter opinion of the District Court (PA 18) was dated July 24, 1980; not to be published. The opinion of the Texas

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[1]In referring to the proceedings below, petitioner will employ the following abbreviations: (PA) — Petitioner's Appendix attached to this petition: (R) — Record in the US District Court.

Unless otherwise indicated, all emphasis has been supplied.

Court of Civil Appeals in *Howell* v. *TX*, a related case, was filed November 23, 1977; 559SW2d432.

JURISDICTION

Following the judgment of the Court of Appeals on August 1, 1983 (PA 19), timely petitions for rehearing were filed by both parties and denied on September 26, 1983 (PA 20). On January 9, 1984, Mr. Justice White extended the time to petition for certiorari until January 24, 1984; No. A-546. On January 25, 1984, Mr. Justice White further extended the time until February 3, 1984. Jurisdictional Statute 28USC§1254 (1).

STATUTE INVOLVED

42 USC, § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner asserts jurisdiction under the Civil Rights Act, *42 USC §§ 1983-1985, 28 USC §§ 1331, 1343, 1344, 1355* and *1357* (R. 1,190). The fact statement in the original opinion of the Court of Ap-

peals being generally adequate, it is here quoted with certain additional comments:

> "On February 19, 1976, Howell filed a civil rights action pursuant to 42 USC §§ 1983-85 against the State Bar of Texas and three of its officers, seeking declaratory and injunctive relief to prevent his disbarment in a then-pending Texas court proceeding. On March 1, 1976, Howell moved for a preliminary injunction to enjoin prosecution of the state disciplinary action. The district court, in an order of crucial importance to this appeal, denied Howell's motion. That order, issued March 4, 1976, states:
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> > "'Plaintiff's Motion for Preliminary Injunction was brought before the Court on March 1, 1976. After having heard and considered the affidavits of plaintiff and the oral and written argument of counsel, this Court is of the opinion that the preliminary injunction should be denied. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 [, 95 S.Ct. 1200, 43 L.Ed.2d 482] (197[5]) [;] *Younger* v. *Harris*, 401 U.S. 37 [, 91 S.Ct. 746, 27 L.Ed.2d 669] (1971). Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England* v. [*Louisiana State*] *Board of Medical Examiners*, 375 U.S. 411 [, 84 S.Ct. 461, 11 L.Ed.2d 440] (1964)'.[1]

[1] "The district court's order denying a preliminary injunction was affirmed by this court in an unpublished, per curiam opinion. *Howell* v. *State Bar of Texas*, 551 F.2d 661 (5th Cir. 1977) (citing Fifth Circuit Rule 21)." More precisely, no opinion was either written or published.

"On March 9, 1976, the State Bar of Texas moved under Rule 12, Fed.R.Civ.P., for dismissal of Howell's action. No supporting brief was filed at the time.

"After trial, Howell was found guilty of professional misconduct and reprimanded by the state court. While his appeal of the reprimand was pending before the Texas Court of Civil Appeals, Howell again moved the federal district court for a preliminary injunction. On April 15, 1977, the district court denied that motion and reaffirmed its March 4, 1976 order. The Texas Court of Civil Appeals affirmed the judgment of the lower court in the disbarment action, a decision the Texas Supreme Court declined to review. *Howell* v. *State*, 559S.W.2d432 (Tex.Civ.App. 1977 — writ ref'd n.r.e.). Howell presented no federal constitutional claims in the state proceedings at either the trial or appellate level[3] (PA 9-11).

Petitioner's allegation that he fully complied with *England* at every stage of the state court proceedings and fully reserved his federal rights for federal litigation has never been challenged.

"On June 30, 1978, Howell returned to federal court, again seeking a preliminary injunction, this time to enjoin the Texas courts from giving effect to the judgment in the disbarment action. The district court granted Howell's motion on July 10,

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[3] "We have not examined the entire state court record, but note that counsel for the State Bar conceded at oral argument that Howell did not raise his federal claims in the state disciplinary proceeding."

1978. Howell's case then went through a one-and-a-half year period of dormancy until February 5, 1980, at which time the State Bar of Texas moved the court to dissolve the preliminary injunction and dismiss the action for want of prosecution. The district court denied the State Bar's motion to dismiss on February 25, 1980.

"On April 22, 1980, the State Bar submitted a brief in support of the Rule 12 motion to dismiss that it had filed four years earlier. The State Bar's arguments were both jurisdictional and claim-related. Before ruling on the State Bar's motion to dismiss, the district court granted Howell's June 27, 1980 motion for leave to amend his complaint. Howell's second amended complaint, filed that same day, sought a declaration that the state disciplinary proceeding violated the United States Constitution and an injunction barring the State Bar and certain of its officers from enforcing the state judgment" (PA 11).

By his most recently amended complaint (R 190), petitioner alleged that he suffered federal deprivations as follows:

(1) Through state law, petitioner was provided with the right of jury trial. Disbarment actions are punitive or quasi-criminal in nature. Both due process and equal protection concepts prohibit a state court judge from disregarding a jury verdict in cases of this nature.

(2) The regulatory provision prohibiting conduct "prejudicial to the administration of justice," under

which petitioner was punished, as applied and as construed, is both void for vagueness and is unconstitutionally over-reaching.

(3) Petitioner was brought to trial upon one charge and convicted of another. Such action precluded a fair opportunity to present the express defense of good faith. The unconstitutional switch deprived petitioner of a fundamentally fair trial.

(4) Petitioner's refusal to give names of attorneys consulted by him was urged by the State not to be conduct of a professional nature when petitioner was before the Texas Court of Criminal Appeals and the contention was adopted. The holding estops the State to now argue that such refusal constitutes professional misconduct.

(5) Under Texas law, grievance committee proceedings are comparable to grand jury action and no formal complaint may be filed against an attorney unless a majority vote is secured. Also, under Texas law, the presence of seven members was required in order to constitute a quorum. No constitutionally valid quorum was present when the committee voted to proceed against petitioner Howell because 4 of the 10 members physically present were disqualified, and the remaining 6 did not constitute a quorum with respect to the business at hand (R. 192-195).

"On December 22, 1980, the district court dissolved its earlier preliminary injunction and granted the State Bar's Rule 12 motion to dismiss. The court's order failed to specify which ground or

grounds it relied upon in granting the motion to dismiss. On January 13, 1981, the district court denied Howell's Rule 60 (b) motion for reconsideration and cited *Kimball* v. *Florida Bar*, 632 F.2d 1283 (5th Cir. 1980), evidently as authority for its earlier grant of the Rule 12 motion to dismiss. The court's explicit reliance on *Kimball* leads us to conclude that the district court's dismissal was premised on jurisdictional grounds.

"Howell now appeals the district court's grant of the State Bar's motion to dismiss and that court's denial of his reconsideration motion. We reverse the district court's dismissal and remand for disposition of Howell's federal constitutional claims on their merits" (PA 11-12).

Respondent State Bar petitioned for certiorari, No. 82-397, which, as already stated, resulted in this Court's order for re-consideration (PA 19). On August 1, 1983, the Fifth Circuit affirmed the action of the District Court in major part, holding that the District Court was without jurisdiction to consider any of the petitioner's claims except for No. (2) (PA 1). Hence, this petition.

REASONS FOR GRANTING THE WRIT

In effect, the Court of Appeals by its second decision has declared, "It matters not how meritorious the petitioner's case. Our hands are tied. The United States District Court has no jurisdiction." Contrariwise:

(1) *Dist. Col. Ct.* v. *Feldman, supra,* does not control this case. In that case, the Supreme Court expressly declared, "This case is not like *England* v. *Medical Examiners,* 376 U.S. 411 (1964), which arose in the abstention context." *Id.* n. 14. Petitioner Howell's case, now before the court, did in fact arise in the abstention context and all questions now in bar involve the effect of abstention, a topic expressly left untouched in *Feldman*.

The key to the situation is that Feldman was in the state court by choice. The choice may not have been entirely free. Few choices in life are utterly free. Even a child in a candy store is limited by the money given to him by his parents. Nevertheless, Feldman's situation was totally different from petitioner Howell who was hailed into state court *against his will*.

(2) Following the District Court's abstention order, petitioner invoked the reservation mechanism in *England* v. *Exrs, supra.* But, the Court of Appeals ruled *England* applies only to *Pullman* type abstention inferentially declaring, "This is not a *Pullman* case." We urge both legs of this proposition as error.

(3) Invoking *Feldman* and the 60 year old case of *Rooker* v. *Fidelity,* 263 U.S. 413 (23), the Court below held, in substance, that the state judgment entered against petitioner while the federal court was in abstention is res judicata, inferentially declaring "Res judicata is a jurisdictional matter. Federal district court jurisdiction *disappeared* when the state court judgment was entered." We urge both legs of this proposition as

error. Abstention only postpones federal district court jurisdiction.

(4) The Doctrine of Disappearing Jurisdiction is anathema. What happened to the classic rule that jurisdiction, once acquired, is not divested by subsequent events? We doubt the wisdom of applying the Doctrine of Disappearing Jurisdiction to cases where the inchoate or potential jurisdiction of federal district court has not yet been invoked, but the proposition is unnecessary to the case in hand. None of the cases from *Rooker* to *Feldman* holds that jurisdiction already invoked has been extinguished, but such is the precise holding of the Fifth Circuit. Such is an unwarranted extension of the Doctrine of Disappearing Jurisdiction.

(5) On February 19, 1976, when the within federal lawsuit was filed, no state court judgment had been entered, and no jurisdictional type of res judicata could have then existed. Of course, it would have been flagrant error, but we believe the U.S. District Court was then possessed of the raw, naked power (*i.e.* jurisdiction in its fundamental sense, strictly defined) to cause the entire case to be removed to the federal courts, *GA* v. *Rachel*, 384 U.S. 808 (66), *28 USC § 1443*.

Likewise, the subsequent case of *Middlesex County Ethics* v. *Bar*, 102 SCT 2515 (82) indicates that the District Court below would have erred, had he not invoked abstention,[4] but that proposition has nothing to do with jurisdiction when such term is strictly and

[4] Petitioner originally urged that abstention should not be invoked primarily on the strength of *Polk* v. *Bar*, 480 F2d 996 (5-TX73).

properly defined. Beyond doubt, during February of 1976, the District Court was clothed with ample power to enjoin prosecution of the state court disbarment action on any federal ground perceived, including hypothetical grounds (*e.g.* that the state court might refuse to follow a jury verdict in favor of the accused) and its ruling could not have been collaterally attacked — the ultimate test for a judgment entered without jurisdiction, *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). The only recourse of the state authority would have been an appeal to the appropriate higher federal court.

(6) What happened to federal jurisdiction which clearly existed on the date of the abstention order below? *Younger* v. *Harris*, 401 U.S. 37 (71), upon which the abstention order was bottomed, and numerous other authorities, holds that federal jurisdiction is merely deferred and not abdicated by abstention. Nonetheless, the Fifth Circuit has ruled that in this case, the abstention order has forever precluded petitioner of his right to § *1983* review. Why? Because the Fifth Circuit invoked the Doctrine of Disappearing Jurisdiction. Relying on *Rooker*, the Court of Appeals has, in substance, intoned: "State judgments are not only res judicata upon federal courts, but *they are also jurisdiction-ousting*. We have power to relieve from res judicata and would do so in this case except for the fact that federal jurisdiction has been obliterated by the state court judgment." What a non sequitur! What a harsh result!!

THE SO-CALLED ROOKER DOCTRINE SHOULD BE RE-VISITED AND RE-DEFINED

The most troublesome of precedents are those cases where an obviously correct result was reached on the basis of an inappropriate or an unnecessary holding. Who can argue but that a correct result was reached in *Rooker* v. *Fidelity*? It is equally obvious that the result could have been easily reached upon then well accepted principles of res judicata and the like. We further suggest that a holding to the effect that, "there may be no appeal from a state court to a lower federal court," while obviously true as a general proposition, was both unnecessary and inappropriate.

Assume that a judgment be rendered in North Dakota and that the same or similar subject matter be thereafter litigated between the same parties in the courts of South Dakota. For the South Dakota court to declare, "We have no appellate jurisdiction over the courts of North Dakota" would be no more than a statement of the obvious. At the same moment, such a ruling might be employed in avoidance of the task of analyzing the rules of res judicata and preclusion which should govern the case.

Of course, an unsuccessful litigant in a North Dakota case cannot give notice that he hereby appeals to the courts of South Dakota and proceed to file his transcript in South Dakota. The notion is idiotic. A declaration that, "only the United States Supreme Court has appellate jurisdiction over the state courts" is equally simplistic. The statement, while patently true, does not establish that the lower federal courts have no jurisdiction (power) *in a proper case*, to

examine a state court decision for compliance with the Constitution and laws of the United States. Such raw common naked power (*i.e.* jurisdiction) has, without question, existed since the adoption of the *14th Amendment* and the Civil Rights Act in implementation thereof. The existence of such power (jurisdiction) has not been subject to question since *Pennoyer* v. *Neff*, supra. *Pennoyer* lays down the proposition that a judgment entered without jurisdiction may be collaterally attacked. In *Sosna* v. *IA*, 419 U.S. 393 (75), the parties had previously litigated the same subject matter in state court. The unsuccessful party, rather than follow the established avenues of appeal through the state system to the United States Supreme Court, commenced litigation anew in the United States District Court. When the latter case reached the Supreme Court, this Court held that it would not examine the question of the res judicata effect of the state action as not being properly raised by either party.

It is well established that an appellate court only has the jurisdiction of the court from which an appeal has been taken. If the lower federal courts are *jurisdictionally* barred from the examination of state court judgments, it follows that the United States Supreme Court erred in *Sosna* because the federal courts, being courts of limited jurisdiction, are under an obligation to notice questions of jurisdiction on their own motion. Furthermore, on principles of *Pennoyer*, if *Rooker* establishes that prior state judgments act as a jurisdictional limitation upon lower federal courts, it follows that the Supreme Court was without jurisdiction in

Sosna and the Court's decision in that case is subject to collateral attack.[5]

It is submitted that no policy consideration and no precedent before or since *Rooker* justifies dressing up questions of res judicata and its ilk in the clothes of jurisdiction.[6] *Rooker* only serves to cloud an already complicated subject matter, *i.e.* the inter-relation between state and federal litigation relating to the same or similar subject matter, particularly under the *Civil Rights Act*. *Rooker* invokes no prior precedent transposing questions of res judicata into principles of jurisdiction and we know of none. The Supreme Court should disclaim the proposition and put the Doctrine of Disappearing Jurisdiction to rest.

Similarly, in *Ellis* v. *Dyson*, 415 U.S. 452 (74), those individuals had pleaded no contest in state court before filing their § *1983* action. The majority brushed aside res judicata claims and remanded to determine if there was a threat of future prosecution. Clearly, if res judicata is of jurisdictional proportions when state judgments are involved, the Supreme Court was obligated to examine the question and dismiss unless jurisdiction was established.

[6]We cannot accept the notion that *Atlantic Coast Line* v. *Engineers*, 398 U.S. 281 (70), heavily relied upon in *Feldman*, is truly a jurisdictional authority. The Supreme Court expressly held that state and federal jurisdiction was "concurrent." *Id.* 295 citing *England* as authority. Could the federal injunction have been collaterally attacked as void, the ultimate test of jurisdiction? Clearly not! Ergo, the case does not involve jurisdiction, strictly construed. In our view, *Atlantic* is a comity declaration comparable to *Younger* and *Pullman*. However, *Atlantic* cannot be labelled as an abstention case because the principle of deferred adjudication was absent.

Consider *Henry* v. *Bank*, 595 F2d 291, 298n. (5-MS79), where the NAACP secured a federal injunction against enforcing a state judgment. If *Atlantic*, *Rooker* and *Feldman* are jurisdictional, then the Doctrine of Disappearing Jurisdiction elaborated therein, establishes that the injunction in *Henry* was subject to collateral attack: a proposition which we deny.

The *14th Amendment* contained broad and sweeping limitations upon the power of state authorities, from the least to the greatest, to act against the individual citizen. The *Civil Rights Act* established the lower federal courts as the primary forum to determine claims for the deprivation of civil rights. Now one hundred years later, many persons would still argue against such enactments. However, such is the law of the land; the argument long since barren and unfruitful.

Following *Pennoyer,* the case of *Ex Parte Royall,* 117 U.S. 241 (1886) made it clear; judicial restraint rather than jurisdiction was the true limitation upon lower federal courts with respect to matters involved in state litigation. Those views were updated and reinforced in *Fay* v. *Noia,* 372 U.S. 391 (63) and *Younger* v. *Harris, supra.*

As applied to criminal cases, any contention that the lower federal courts are exercising "appellate review of state court decisions" when considering habeas petitions was put to rest long ago. We cannot conceive why the power of lower federal courts to review state civil decisions should be more limited by *jurisdictional restrictions* than criminal decisions. Any distinguishing limitations should only spring from the law of res judicata.[7] The Fifth Circuit has held that petitioner has not had a full and fair opportunity to litigate his federal claims and that, for such reason, res judicata cannot be

[7] The absence of the Doctrine of Disappearing Jurisdiction in criminal cases reinforces our belief that the doctrine was born out of res judicata, that it rests only on res judicata principles and that it is no more than a restatement of the law of res judicata in the language of jurisdiction.

invoked to deny him a forum. The jurisdictional grounds perceived by the Court for denying that forum do not exist.

PETITIONER PRESERVED FEDERAL REVIEW THROUGH A VALID ENGLAND RESERVATION

Without explication, the Fifth Circuit brushed aside petitioner's claims of right to federal review under *England* declaring that such "is an incident of *Pullman* abstention" and the District Court "erroneously" promised subsequent federal review (PA 15).

First of all, the essential holding in *Railroad Com. v. Pullman*, 312 U.S. 496 (41) is essentially the same as the ruling of the District Court below: The actions of state authorities should first be challenged in the state courts. The federal courts should abstain from exercising their jurisdiction until the state courts have spoken. We present that *Pullman* abstention considerations apply to this case equally with *Younger*. In final analysis, there is no distinction. In *Pullman*, the Court declared a policy of non-intervention with state authority acting in the civil sphere and in *Younger*, the Court declared a policy of non-intervention with state authority in the criminal sphere. As held in *In re Ruffalo*, 390 US 544 (68), and again in *Middlesex County Ethics*, *supra*, disciplinary actions against occupational license holders can no more be categorized as strictly civil than as strictly criminal. The attributes are hybrid. It follows they are governed as much by one as the other.

Neither is there any significant distinction between *England* and the case at bar. Both cases involve the rights of occupational license holders. In *England*, the

occupational license holders elected the federal forum for the vindication of federal rights in the first instance and they were relegated to the state forum *against their will.* In such circumstances, the Supreme Court declared in *England* that the right to eventual federal review of federal claims is not to be denied so long as those claims are reserved while the individual, who is in state court *against his will,* does not unreservedly present those claims for state court review.

There is no distinction in the present case, save that Judge Howell was hailed into state court at the outset. He was nevertheless in state court *against his will* and, when he petitioned for federal review of his federal claims, he was relegated back to state court. Any distinction between *England* and Howell is without substance.[8]

England declares:

> "***the litigant is in no event to be denied his right to be returned to the District Court unless it clearly appears that he voluntarily *** and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved." *Ibid.* 421-422.

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[8]Some of the authorities consider that *Pullman* abstention only applies if the validity of a state statute or regulation is challenged. If so, petitioner fulfilled that test by pleading the state bar rules to be "void as repugnant" to the *14th Amendment* and by challenging the same for "vagueness and overbreadth" (R. 36-7, 41-2).

In three successive cases of recent vintage, *MT* v. *US*,[9] 440 U.S. 147 (79), *Allen* v. *McCurry*, [10] 449 U.S. 90 (80) and most recently in *Dist. Col. Ct.* v. *Feldman*, *supra*, the Supreme Court, while restricting the right of recourse to the federal district court subsequent to proceedings in state court, has upheld the continuing validity of the *England* reservation mechanism. Even if res judicata is truly a jurisdictional concept, as held below, *England* is ample authority for the proposition that when an *England* reservation has been carved out, the state court does not acquire jurisdiction over the litigant's federal claims. Without such holding, *England* perishes.

> "*Younger*, without doubt, is expanding in all conceivable directions. ***
>
> "Surely the range of state civil proceedings in which federal courts will refuse to intervene will continue to broaden.*** Indeed, *** [it] may be expanded to the point where federal courts will refuse to intervene in any litigation brought by state officials to advance any important state policy.
>
> *** *** ***

[9] "We *** invoke *England* simply to dispel any inference that the same result would obtain if the Federal Government had been forced into state court and had reserved its federal claim." *Id.* 164, n.

[10] "*** *England* *** is inapposite [to this case] ***. Where a plaintiff properly invokes federal court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction ***. Abstention may serve only to postpone, rather than abdicate, jurisdiction. ***." *Id.* 101-2, n.

"If *Younger* principles continue to expand and if broad res judicata effect is given to state court judgments, then the promise of the Civil Rights Act that one with a constitutional grievance shall have his *choice* of federal court or state court will become empty. ***

"In *Younger* itself***; the Court merely forbade injunction during the course of the trial. *** In reviewing *** [a subsequent] petition for habeas corpus, the federal court need not give res judicata effect***. Federal courts *** retain full right to re-litigate federal constitutional questions in the context of habeas corpus.

"If relitigation in habeas corpus after exhaustion of state remedies is permissible, then relitigation in a Civil Rights Act suit should also be permissible. As it becomes increasingly more difficult to avoid state court litigation, ***only full relitigation in federal court will preserve the element of choice embodied in the 1871 Act.***

"The Supreme Court *** indicated its concern for the litigant who has been forced into state court*** [in *England* where] the District Court abstained*** in accordance with the *Pullman* doctrine.***

*** *** ***

"*This concern should be equally great where the abstention is of the Younger variety.*** The

federal courts clearly have a congressional mandate to hear suits for deprivations of civil rights. Expansion of the *Younger* abstention doctrine *** must be tempered through a restrained application of res judicata principles. *England* suggests that the Court will follow a middle road: allowing initial state resolution but retaining a final check." Theis, *Res Judicata*, 70 NWLR 859, 870-875 (76).

While recent decisions, notably *Allen* v. *McCurry*, supra, and *Dist. Col. Ct.* v. *Feldman*, supra, have not bee in accord with the commentator's view that a restrained version of res judicata should apply under the *Civil Rights Act*, they have served to underscore the problem. On strength thereof, petitioner urgently suggests that the *England* reservation mechanism is the only recourse available to the individual citizen hailed into court *against his will*. Unless the same be expressly held applicable to *Younger* type abstention, the promise of a federal forum to litigate federal issues becomes vain and empty.

It is true that *England* only discusses abstention under the *Pullman* case; necessarily so because *England* antedates *Younger* by several years. We know of neither authority nor logical principle for restricting the *England* reservation mechanism to cases where abstention is invoked on authority of *Pullman*.

Most certainly, the right to labor and earn a living at one's chosen occupation, particularly when a large amount of money, training and effort has gone into the preparation to follow that occupation, touches upon the

most important and fundamental of human rights. In *Silverman* v. *Browning*, 414 FS 80 (3-Judge DCCN 76) affd 429 U.S. 876 (76), *England* principles were held applicable in an occupational license case. Other occupational license cases invoking the *England* rule are *Mack* v. *Board*, 430 F2d 862 (5-FL 70), *Lombard* v. *Board*, 502 F2d 631 (2-NY 74), *Newman* v. *Board*, 508 F2d 277 (2-NY 75), *Graves* v. *Olgiatti*, 550 F2d 1327 (2-NY 77), *Board* v. *Tomanio*, 603 F2d 255 (2-NY 79), rvsd.oth.gds. 446 U.S. 478 (80), and *Blunt* v. *Board*, 515F2d 951, 956 (5-FL 75).[11]

Tomanio is of particular interest because the Supreme Court there assumed as correct the lower court holding that *England* was applicable to occupational license cases with no *Pullman* abstention principles involved. Similarly, the denial of certiorari in *FL St. Bd.* v. *Mack*, 401 U.S. 960 (71) is of significance because it drew two dissenting opinions thereby indicating that a substantial majority of the Supreme Court considered the Fifth Circuit decision correct. Also, the summary affirmance in *Silverman* constitutes a ruling upon the merits. *Edelman* v. *Jordan*, 415 U.S. 651, 670-1 (74).

In summary, petitioner duly invoked the *England* reservation mechanism while before the state court. The right to do so is not limited to those cases where abstention was invoked by the federal court on

[11] If the Doctrine of Disappearing Jurisdiction as viewed in the opinion below be upheld, it follows that most of these occupational license decisions are subject to collateral attack for want of jurisdiction. The same would apply to the Supreme Court decision in *Tomanio*.

authority of *Pullman*. Neither logic nor authority will sustain that proposition. Even if res judicata be viewed as a jurisdictional limitation on the power of lower federal courts, *England* mandates a holding that once the reservation mechanism is invoked, jurisdiction of federal claims passes to the federal court and does not disappear when the state court rules. Without proposition, *England* becomes a nullity. *England*, standing alone, demands reversal hereof.

THIS CASE AROSE IN THE ABSTENTION CONTEXT AND IS THEREFORE UNLIKE FELDMAN

> "This case is not like *England* v. *Medical Examiners*, 375 U.S. 411 (1964), which arose in the abstention context, and discussed a litigant's right to reserve his federal claims for consideration by a federal court ***." *Dist. Col. Ct.* v. *Feldman, supra*, n. 14

The Court of Appeals held *Feldman* to be controlling even though this case arose "in the abstention context." We think this is the first application of the Doctrine of Disappearing Jurisdiction to a pending federal case.[12]

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[12] "The Doctrine of Disappearing Jurisdiction presupposes that the federal district court would have had jurisdiction of the particular claim *but for the fact* that the claim was raised or could have been raised in the state court before that court went to judgment. Of course, we speak only of the federal court's unexercised or potential jurisdiction not yet invoked. Putting the matter another way, the *Rooker* line of cases seizes upon the preclusive effect of prior state litigation as grounds for foreclosing federal district court consideration of an alleged breach of the Constitution and laws of the United States (Jurisdiction has disappeared). Thusly stated, the res judicata nature of the Doctrine is plain.

One: Petitioner suggests that the Doctrine of Disappearing Jurisdiction does no more than add unnecessary complications to an extremely complex subject, the law of res judicata.[13] It further deprives the lower courts of the power to grant relief, even to the most meritorious case, precisely the present dilemma.

Theis, *Res Judicata, supra,* questions the extent to which *Rooker* has made res judicata principles jurisdictional.

> "The question is more than an academic one. A res judicata defense must be raised by appropriate pleading, ***and can be waived by failure to do so. An objection to the court's subject matter jurisdiction cannot be waived by the parties. The court may consider any objections of this sort on its own motion at any time in the proceedings." *Id.* 879, n. 114.

Two: The Fifth Circuit Court exhibited greatest concern with footnote 16 of *Feldman* wherein this Court labelled *Dasher* v. *Supreme,* 658 F2d 1045 (5-TX 81) as "flawed," and stated that by failing to raise federal claims in state court, a petitioner may forfeit his right

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[13]The Supreme Court itself has experienced continuing difficulty. In *Hawkins* v. *Board,* 355 U.S. 839 (57), an unsuccessful applicant for law school admission sought certiorari to the Florida courts and this Court denied certiorari without prejudice to his right to seek "relief in an appropriate United States District Court." Was the Supreme Court not casting him into the black hole of the Doctrine of Disappearing Jurisdiction from which the federal courts are powerless to retrieve? See discussion in Theis, *Res Judicata, supra,* 880 n. Also, see petitioner's previous discussion of *Sosna* v. *IA, supra, Ellis* v. *Dyson, supra* and *Board* v. *Tomanio, supra.*

to review "in any federal court."[14]

To the contrary, the availability of certiorari is not decisive. As numerously held, the right to petition for certiorari is not a practical alternative to the right to prosecute a § *1983* claim in the federal district court.

How are footnotes 14 and 16 to be reconciled? The only means occurring to us is to hold that different rules apply to the "abstention context". Inasmuch as Judge Howell's case involves the "abstention context" and *Feldman* does not, footnote 16 has little or no effect upon the case at hand.

Three: In three successive cases, *MT* v. *US, supra, Allen* v. *McCurry, supra,* and now in *Feldman,* the Supreme Court has upheld the *England* mechanism. Even if *England* be exclusively "an incident of *Pullman* abstention," it remains as direct precedent for reversal hereof. The *England* petitioners acted erron-

[14]The respective Courts of Appeals in *Feldman* and in *Dasher* held the turning point of those cases to be that the respective claimants had no means to obtain Supreme Court review because they had no opportunity to lay the required foundation for certiorari by urging federal claims in state court. In footnote 16, the Supreme Court appeared to accept this premise, but we believe the Supreme Court's own analysis to be somewhat flawed.

A petition for rehearing will not *ordinarily* satisfy the requirement that in order to obtain review on certiorari, the federal question must have been presented in the state court. However, the rule does not apply where the federal question is first introduced into a state court proceedings by the ruling of the state's highest court. Stern & G. *S.Ct.Pract.* 220-1 (5 ed. 78) and citations therein. If *Feldman* (and *Dasher*) was as surprised by the ruling of the state-equivalent court as he claimed to be, it follows that he (and Dasher) could indeed have established the right to petition for certiorari had he only stated his federal questions in a petition for rehearing to the D.C. court.

eously in the state court by arguing their claims instead of reserving them, but they were not precluded because *they were only doing what the federal district court had declared as a predicate to its review.*

Likewise, Judge Howell withheld his federal questions on the basis of federal assurance that those claims had been reserved. *England* holds that insofar as petitioner Howell relied on an *erroneous* federal district court ruling, that he should nevertheless have the federal review promised to him. He may not be prejudiced by the federal error. If the matter needs statement in jurisdictional language, it must be held that the United States District Court, by invoking abstention, whether or not doing so erroneously, carved out and retained jurisdiction of all federal claims. It's that simple!!

Four: The Fifth Circuit indicated an opinion that the *England* reservation cannot apply where *Younger* applies, even by way of overlap; a massive narrowing and the potential demise of the *England* doctrine.

On theory, the mechanism is just as applicable to *Younger* abstention as to *Pullman*. The underlying principles are identical being the entitlement to a federal forum for federal questions. Abstention does not abdicate but merely postpones federal jurisdiction, *Allen* v. *McCurry, supra.* We emphasize: *McCurry* involved *Younger,* not *Pullman,* abstention principles. Unless the fundamental concept of postponed jurisdiction is to be abandoned in *Younger*-type cases, *England* must be made available. Again, *Younger* is a product of the criminal law where res judicata has no applica-

tion and federal habeas is freely available after state remedies are exhausted. However, now that *Younger* has been applied to cases where federal habeas is not available, either the *England* doctrine or some similar procedure must be devised to preserve the right of eventual federal review.

Five: The "abstention context" contains three essential ingredients: (1) the individual citizen must be in litigation with state authority. (2) the citizen must be in state court. (3) the citizen must be in that court *against his will.*

Whie the first two elements were arguably present in *Feldman,* the third element was clearly absent. Feldman alone initiated the litigation and inasmuch as he elected to commence his litigation in state-equivalent court, the "abstention context" cannot be present.

England must be recognized as an exception to the usual rules relating to the finality of state court litigation. Otherwise, *England* is both a snare and a delusion. The "abstention context" was not present in *Feldman* and the Supreme Court has so held. Neither was it present in *Rooker* or in *Feldman* or in *Dasher,* and those cases are not inapplicable.

Six: The term "no jurisdiction" is often employed to mean "no venue" or as a shorthand expression of the fact that it would be procedurally erroneous for the court to act.

For the United States Supreme Court to accept a

case for argument and rule that the state court has failed to follow its own law would clearly exceed the constitutional powers of our highest court, even granting palpable error by the state court.[15] On the other hand, neither the Constitution nor any federal statute declares the Supreme Court to be without constitutional power (jurisdiction) to consider, on certiorari directly from a state's highest court, the claim that a federal right was deprived, unless that claim was made throughout the state court proceedings. Such rule has existed from earliest times, but it is a rule of comity, a rule of practice, a procedural requirement which the Supreme Court has imposed upon those who would invoke its jurisdiction. Strictly speaking, it is not a constitutional limit on the Supreme Court's power and it therefore is not a jurisdictional matter. See *Wood* v. *GA*, 450 U.S. 261 (81). Wherever the term "jurisdiction" is used, it is necessary to analyze the sense in which the term has been applied.

Should the Supreme Court ever decide in petitioner's favor, a federal claim not raised below, could that decision later be attacked collaterally? Of course not!! The term "venue" on the other hand presupposes the existence of two courts, each with the constitutional power to proceed and inquires in which of the two would

[15] This was the substance of the claim in *Rooker* v. *Fidelity*, *supra*, wherein the petitioner urged that the state denied due process by failing to follow clearly established precedent. To our knowledge, 14th Amendment protection has never been extended so far in a private civil litigation such as *Rooker*. In state habeas cases, which are exempt from res judicata and to which the Doctrine of Disappearing Jurisdiction has never been applied, it has been held that a habeas petitioner must show that a manifestly unfair trial resulted from the state court's failure to follow established procedures.

a case be more appropriately lodged. While jurisdictional claims may be raised at any time, even on appeal, and a court must raise them on its own motion, venue claims are waived unless expeditiously asserted.

The term "venue" is ordinarily employed only in a geographical sense, but we submit that the search for the line of cleavage between those federal claims which must be relegated to state court and those federal claims which may be heard in federal district court is in reality an inquiry as to venue rather than an inquiry as to the constitutional power of federal district courts to proceed. *Atlantic Coast Line* v. *Engineers, supra.* As previously submitted, the raw, naked constitutional power of a U.S. District Court to act springs from the *Fourteenth Amendment* and the *Civil Rights Act. Ex parte Royall, supra, Pullman, Younger, Rooker,* and *England* are all of them venue decisions and we submit the same as to *Feldman.* They spell out the situations under which it would be inappropriate or improper for a federal district court to act, but none of them should be construed as strict limitations upon the *power* to proceed. In *Younger* and *Pullman* the distinction is made plain whereas the distinction is not so precisely drawn elsewhere.

In *Feldman,* the Supreme Court held that certain claims stated in the complaint could proceed in District Court and certain claims could not. Is the Supreme Court to be construed as holding that certain of Feldman's federal claims are within the constitutional power of the district court whereas others are so far beyond its constitutional power that any ruling thereon

would be void and subject to collateral attack? Ridiculous!! *Feldman,* we submit, is primarily a venue decision.

Seven: As long as the *England* reservation remained in effect, jurisdiction over petitioner Howell's *federal* claims remained with the federal court and not with the state court. This is the heart of the abstention doctrine, in all abstention cases from *Pullman* forward.

An abstention order by its very nature creates divided jurisdiction. After the entry of an abstention order, *a state court* is without jurisdiction (constitutional power) to pass upon federal claims. Error, if any, of the federal court does not affect its power to reserve federal claims. If the state court proceeds to rule upon federal claims, its rulings are void and subject to collateral attack. This is the essence of *England* doctrine wherein the Supreme Court held express state court rulings upon federal issuesto be void and of no effect. Neither the *England* doctrine nor the entire abstention concept can operate unless this fundamental concept be recognized. The lack of jurisdiction lays in the other direction. The state court was without power to foreclose petitioner's claims.

In diversity litigation, a removal of the case to federal court makes any further state court rulings utterly void and subject to collateral attack and the same principles apply here. Beyond doubt, the abstention order was within the constitutional powers of the U.S. District Court. As long as the federal case remained

pending,[16] the cause of action as a whole could not have become final because the state court had no power to dispose of the federal aspects of the case.

CONCLUSION

Feldman has no application or, at least, it is not controlling because the case sub judice arose in the abstention context whereas *Feldman* did not. The Doctrine of Disappearing Jurisdiction, emanating from *Rooker* v. *Fidelity, supra,* is strictly a creature of the courts and as such, can be limited or renounced outright by the courts as easily as they fashioned that doctrine in the first instance. It should not be held controlling in this abstention case because it is destructive of the proposition that abstention only postpones the exercise of federal jurisdiction. *Feldman* merely holds that the inchoate or potential or un-invoked jurisdiction of the federal district court disappeared when the state-equivalent court went to judgment. Presently, the Fifth Circuit has held that Federal District Court jurisdiction *which had actually been invoked* by petitioner and which the District Court had expressly reserved "should that prove necessary" (PA 22) was ousted by the state court judgment. Such an expansive application of the Doctrine of Disappearing Jurisdiction is unnecessary and should not be countenanced. The jurisdiction of the United States District Court had already attached when the state court went to judgment and it

[16] We point out that the District Court did not dismiss at the time of its abstention order (PA 22) or at any other relevant time. Even if it erred by failing to do so, such error could not cause its jurisdiction to disappear.

was beyond the power of the state court to destroy federal jurisdiction already vested and exercised. Certainly, the state court could not have done so by fiat. Neither should it be held to have done so by operation of law, an even more insidious proposition.

Certiorari should be granted to explore the proper application, if there be one, of the Doctrine of Disappearing Jurisdiction.

Respectfully submitted,

TOM SCOTT MCCORKLE, JR.
Attorney for Respondent

Appendix

IN THE

Supreme Court Of The United States

CHARLES BEN HOWELL,

Petitioner,

v.

STATE BAR OF TEXAS, ET AL.,

Respondents.

PETITIONER'S APPENDIX

US COURT OF APPEALS, FIFTH CIRCUIT, CHARLES BEN HOWELL v. STATE BAR OF TEXAS, Et Al; No. 81-1069.

[OPINION]

[Delivered August 1, 1983; 710F2d1075]

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

CLARK, Chief Judge:

In our prior opinion in this case, 674 F.2d 1027, we reversed the district court's ruling that it lacked subject matter jurisdiction. The Supreme Court, ____ U.S.

____, 103 S.Ct. 1515, 75 L.Ed.2d 942, vacated our judgment and remanded the case to us for further consideration in light of its recent decision in *District of Columbia Court of Appeals* v. *Feldman*, ____ U.S. ____, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). With the benefit of the Court's analysis in *Feldman*, we now conclude that the district court lacked jurisdiction to decide most of Howell's claims. But because the court did have jurisdiction over one of Howell's claims, we partially reinstate our prior decision to remand.

In our original opinion, we began our analysis by noting that, as a general rule, federal district courts have no authority to review state court disciplinary proceedings. *Feldman* confirmed that observation, 103 S.Ct. at 1311. *See also Atlantic Coast Line R. Co.* v. *Engineers*, 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *Kimball* v. *Florida Bar*, 632 F.2d 1283, 1284 (5th Cir. 1980); *Sawyer* v. *Overton*, 595 F.2d 252, 252 (5th Cir. 1979). Our opinion, however, went on to discuss the exception to the general rule created in *Dasher* v. *Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981). In that case, this court held that federal district courts have jurisdiction to decide certain federal claims that have not been presented in the state court. *Id.* at 1049-50. We reasoned:

> The record gives no indication that [the plaintiff] asserted the federal constitutional claims which are the basis of her § 1983 action . . . in the Texas Supreme Court. Since 28 U.S.C. § 1257(3) authorizes

> the Supreme Court to review only judgments in state court cases in which a federal issue was raised and adjudicated, . . . it is apparent that [the plaintiff's] case could not have been reviewed on a writ of certiorari from the United States Supreme Court following the Texas Supreme Court's denial of her motion. Since [the plaintiff's] § 1983 complaint states claims for relief grounded in federal constitutional rights, claims which were not presented to the Texas Supreme Court, her § 1983 suit does not constitute an impermissible effort to seek review of a state court judgment in a lower federal court.

Id. at 1051.

The court in *Feldman* branded the *Dasher* reasoning as "flawed." *Id.* 103 S.Ct. at 1315-16 n. 16. It explained:

> As we noted in *Atlantic Coast Line R. Co.* v. *Engineers,* 398 U.S. 281 [90 S.Ct. 1739, 26 L.Ed.2d 234] (1970), "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Id.* at 296 [90 S.Ct. at 1748]. If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Moreover, the fact that we may not have jurisdiction to review a final state court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. *See, e.g., Sumner* v. *Mata,* 449 U.S. 539, 549 [101 S.Ct. 764, 770, 66 L.Ed.2d 722] (1981); *Allen* v. *McCurry,* 449 U.S. 90, 105 [101 S.Ct. 411, 420, 66 L.Ed.2d 308] (1980); *Swain* v. *Pressley,* 430 U.S. 372, 383 [97 S.Ct. 1224, 1230, 51 L.Ed.2d 411] (1977). We also noted in *Cardinale* [v. *Louisiana,* 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398] that one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments. 394 U.S. at 439 [89 S.Ct. at 1163].

Finally, it is important to note in the context of this case the strength of the state interest in regulating the state bar. As we stated in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 [95 S.Ct. 2004, 44 L.Ed.2d 572] (1975), the interest of the States

in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Id.* at 792 [95 S.Ct. at 2016]. *See also Middlesex County Ethics Committee* v. *Garden State Bar Assn., supra* [____ U.S. ____] at ____ [102 S.Ct. 2515, 2523, 73 L.Ed.2d 116]; *Leis* v. *Flynt,* 439 U.S. 438, 442 [99 S.Ct. 698, 700, 58 L.Ed.2d 717] (1979). In *Mackay* v. *Nesbett,* 412 F.2d 846 (CA9 1969), the court stated:

> [O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems. *Id.* at 846.

Id.

In the instant case, all but one of the constitutional claims Howell presented to the district court are "inextricably intertwined" with the Texas State Court's reprimand of Howell in a judicial proceeding. For example, he alleged that he was deprived of his right to a jury trial as well as his right to a fundamentally fair trial. With respect to these claims, Howell has done

nothing more than ask the district court to sit as an appellate court and review the state court judgment. As the Supreme Court perfunctorily stated, "[t]his the District Court may not do."

Howell also mounted a general constitutional challenge to the state's disciplinary scheme. In his original complaint, Howell alleged: "The said [disciplinary] rules upon their face are void as repugnant to Due Process, the Equal Protection and the Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution."

In *Feldman*, the court stated:

> Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States District Court to review a final state court judgment in a judicial proceeding. Instead, the District Court may simply be asked to assess the validity of a rule promulgated in a non-judicial proceeding. If this is the case, the District Court is not reviewing a state court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the District Court's consideration of the case and because the proceedings giving rise to the rule are non-judicial the policies prohibiting United States District Court review of final state court judgments are not implicated. United States District Courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial pro-

> ceedings, which do not require review of a final state court judgment in a particular case.

Feldman, 103 S.Ct. at 1316-17. This language conclusively demonstrates that the district court has jurisdiction to address Howell's general constitutional attack on the Texas disciplinary scheme.

Howell argues that the jurisdictional principles set out in *Feldman* should not be applied in this case because, when the district court first denied his motion for a preliminary injunction, it said: "Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England* v. [*Louisiana State*] *Board of Medical Examiners*, 375 U.S. 411 [, 84 S.Ct. 461, 11 L.Ed.2d 440] (1964)." We pointed out in our original opinion that the district court's statement was wrong. The *England* reservation mechanism applies only in the event of a *Pullman* abstention. This was not such a case. A district court's erroneous interpretation of the law, even when combined with a litigant's asserted reliance on the error, cannot create federal jurisdiction where it would not otherwise exist.

For the reasons discussed in part III of our original opinion, which we will not repeat here, Howell is not collaterally estopped from pressing his facial attack on the validity of the Texas disciplinary scheme. In conclusion, we remand only with respect to the general challenge to the disciplinary scheme and direct the district court to dispose of that claim on the merits. With

respect to all other claims presented by Howell, the district court lacks subject matter jurisdiction. The judgment appealed from is

AFFIRMED IN PART and REVERSED IN PART.

[Same court and case as above)

[OPINION ON REHEARING]

[Delivered Sept. 26, 1983; Not to be Published]

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

PER CURIAM:

In holding that Howell alleged a general constitutional challenge to the state's disciplinary scheme, we incorrectly referred to the original complaint. We should have considered Howell's amended complaint since it displaced his original complaint. The error is one of form not substance since the amended complaint asserts a similar general constitutional attack based on the first and fourteenth amendments. *District of Columbia Court of Appeals* v. *Feldman*, ___ U.S. ___, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), establishes that the district judge has jurisdiction to decide this constitutional challenge to the Texas disciplinary procedure. The petitions for rehearing are DENIED.

[Same court and case as above]

[OPINION)

[Delivered May 3, 1982; 674F2d1027]

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

CLARK, Chief Judge:

Charles Ben Howell appeals the district court's dismissal of his civil rights action challenging the result of a state court disciplinary proceeding against him. We reverse the district court's dismissal and remand with instructions that the district court dispose of Howell's federal claims on their merits.

I

On February 19, 1976, Howell filed a civil rights action pursuant to 42 U.S.C. §§ 1983-85 against the State Bar of Texas and three of its officers, seeking declaratory and injunctive relief to prevent his disbarment in a then-pending Texas court proceeding. On March 1, 1976, Howell moved for a preliminary injunction to enjoin prosecution of the state disciplinary action. The district court, in an order of crucial importance to this appeal, denied Howell's motion. That order, issued March 4, 1976, states:

> Plaintiff's Motion for Preliminary Injunction was brought before the Court on March 1, 1976. After having heard and considered the affidavits of

> plaintiff and the oral and written argument of counsel, this Court is of the opinion that the preliminary injunction should be denied. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 [, 95 S.Ct. 1200, 43 L.Ed.2d 482] (197[5])[;] *Younger* v. *Harris*, 401 U.S. 37 [, 91 S.Ct. 746, 27 L.Ed.2d 669] (1971). Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England* v. [*Louisiana State*] *Board of Medical Examiners*, 375 U.S. 411 [, 84 S.Ct. 461, 11 L.Ed.2d 440] (1964).[1]

On March 9, 1976, the State Bar of Texas moved under Rule 12, Fed.R.Civ.P., for dismissal of Howell's action. No supporting brief was filed at the time.

After trial, Howell was found guilty of professional misconduct and reprimanded by the state court. While his appeal of the reprimand was pending before the Texas Court of Civil Appeals, Howell again moved the federal district court for a preliminary injunction. On April 15, 1977, the district court denied that motion and reaffirmed its March 4, 1976 order.[2] The Texas Court of Civil Appeals affirmed the judgment of the lower court in the disbarment action, a decision the Texas Supreme Court declined to review. *Howell* v.

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[1] The district court's order denying a preliminary injunction was affirmed by this court in an unpublished, per curiam opinion. *Howell* v. *State Bar of Texas*, 551 F.2d 861 (5th Cir. 1977) (citing Fifth Circuit Rule 21).

[2] Howell's appeal of the district court's order was dismissed for want of prosecution due to Howell's failure to file a brief. *Howell* v. *State Bar of Texas*, No. 77-1805 (5th Cir. Feb. 10, 1978).

State, 559 S.W.2d 432 (Tex.Civ.App.1977 — writ ref'd n. r. e.). Howell presented no federal constitutional claims in the state proceedings at either the trial or appellate level.[3]

On June 30, 1978, Howell returned to federal court, again seeking a preliminary injunction, this time to enjoin the Texas courts from giving effect to the judgment in the disbarment action. The district court granted Howell's motion on July 10, 1978. *Howell's* case then went through a one-and-a-half year period of dormancy until February 5, 1980, at which time the State Bar of Texas moved the court to dissolve the preliminary injunction and dismiss the action for want of prosecution. The district court denied the State Bar's motion to dismiss on February 25, 1980.

On April 22, 1980, the State Bar submitted a brief in support of the Rule 12 motion to dismiss that it had filed four years earlier. The State Bar's arguments were both jurisdictional and claim-related. Before ruling on the State Bar's motion to dismiss, the district court granted Howell's June 27, 1980 motion for leave to amend his complaint. Howell's second amended complaint, filed that same day, sought a declaration that the state disciplinary proceeding violated the United States Constitution and an injunction barring the State Bar and certain of its officers from enforcing the state judgment. On December 22, 1980, the district court dissolved its earlier preliminary injunction and granted

[3]We have not examined the entire state court record, but note that counsel for the State Bar conceded at oral argument that Howell did not raise his federal claims in the state disciplinary proceeding.

the State Bar's Rule 12 motion to dismiss. The court's order failed to specify which ground or grounds it relied upon in granting the motion to dismiss. On January 13, 1981, the district court denied Howell's Rule 60(b) motion for reconsideration and cited *Kimball* v. *Florida Bar*, 632 F.2d 1283 (5th Cir. 1980), evidently as authority for its earlier grant of the Rule 12 motion to dismiss. The court's explicit reliance on *Kimball* leads us to conclude that the district court's dismissal was premised on jurisdictional grounds.

Howell now appeals the district court's grant of the State Bar's motion to dismiss and that court's denial of his reconsideration motion. We reverse the district court's dismissal and remand for disposition of Howell's federal constitutional claims on their merits.

II

[1] The State Bar urges affirmance on the ground that Howell's suit seeks review of a state bar disciplinary action, review of which may be had exclusively in the United States Supreme Court. According to recent Fifth Circuit precedent, relied upon by the State Bar and the district court alike, the federal district courts are without jurisdiction to review state court disciplinary proceedings. *See Kimball* v. *Florida Bar, supra; Sawyer* v. *Overton*, 595 F.2d 252 (5th Cir. 1979). In *Sawyer* the attorney-plaintiff had been suspended by the Florida Supreme Court for three months. This court, in affirming the lower court's dismissal of the suit, opined that federal district courts

> hold no warrant to review final judgments of the Florida Supreme Court. That power is reserved to the Supreme Court of the United States. Complaining of constitutional violations, Mr. Sawyer has cast his complaint in the form of a civil rights suit. What he seeks, however, is simply reversal of the state court judgment. . . . [T]he state proceedings . . . . could have been reviewed in the Supreme Court. Mr. Sawyer has boarded the wrong flight.

Sawyer v. *Overton*, 595 F.2d at 252 (citation omitted). But for an odd quirk in this case, *Sawyer* and *Kimball* would be controlling.

The rule of *Sawyer* and *Kimball* is necessarily premised on the availability of Supreme Court review of an offensive state court judgment.[4] Supreme Court review of Howell's disciplinary proceeding was impossible. Since Howell raised no federal claims in the Texas courts, due no doubt to the federal district court's assurance that he could return to federal court with his

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[4]The unmentioned but obvious antedecent of *Sawyer* and *Kimball* is *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), the case that spawned the so-called *Rooker* doctrine. *Rooker* held that only the Supreme Court can entertain jurisdiction of a proceeding to reverse or modify a state court judgment. *Id.* at 415-16, 44 S.Ct. at 150, 68 L.Ed. at 365. A panel of this court recently disputed that *Rooker* still stands, if it ever stood, for that proposition. *See Gresham Park Community Org.* v. *Howell*, 652 F.2d 1227, 1233-36 (1981). One recent commentator, while conceding that *Rooker* has been subjected to narrowing constructions, argues for its continuing vitality. *See* Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 Hastings L.J. 1337, 1344 & n. 46, 1375-77 (1980). *But see Developments in the Law — Section 1983 and Federalism*, 90 Harv.L.Rev. 1133, 1334 n. 14 (1977).

federal claims, Supreme Court review was unavailable. Our holding that the unavailability of Supreme Court review distinguishes this case from *Sawyer* and *Kimball* and obliges the district court to assume jurisdiction of Howell's action is mandated by a recent decision of this court.

In *Dasher* v. *Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981), the plaintiff brought a civil rights action in federal court challenging the Texas Supreme Court's decision not to admit her to the Texas bar as violative of the United States Constitution. The plaintiff had not raised any federal constitutional claims before the Texas Supreme Court, thus, rendering the state court's decision unreviewable by the United States Supreme Court under 28 U.S.C. § 1257 (3). This court noted that the availability of Supreme Court review "has served as a predicate for numerous decisions in the lower federal courts holding that district courts have no jurisdiction to review, under the guise of a § 1983 suit, state court decisions in cases involving individuals' applications for admission to the state's bar." *Dasher*, 658 F.2d at 1049-50. The court held that the plaintiff's suit was within the district court's jurisdiction since her federal claims were not presented in the state court and thus review was not available in the Supreme Court. *Id.* at 1051.[8]

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28 U.S.C. § 1257 (3) provides, in part, that "[f]inal judgments . . . rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution."

[8]The undropped shoe in *Dasher* is res judicata. The opinion does not mention res judicata and we presume that it was not pleaded in the dis-

[2] Howell withheld his federal constitutional arguments from the state courts after the federal district court relegated him to the state system with a promise that he could return with his federal claims pursuant to *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). The district court held out that promise erroneously, since the *England* reservation mechanism is an incident of *Pullman* abstention.[7] The district court more properly should have dismissed Howell's action and relegated him to the state courts to present all of his claims. Instead, the district court's citation to *England* assured Howell that he could present his state claims in state court and then, if necessary, return to federal court with his federal claims. As a result, the Texas disbarment action could not have been reviewed by the United States Supreme Court. Thus, *Dasher* establishes that the district court has jurisdiction over Howell's federal claims.

III

The State Bar, as an alternative argument for affirmance, claims that res judicata forbids litigation of claims in federal court that might have been litigated in state court. While we agree that in the normal case res judicata would apply, the facts of this case once again fall outside of the general rule.

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trict court as an affirmative defense. Thus, we note that in the ordinary case res judicata would apply where state and federal legal theories are "split" between two forums.

[7] *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

[3] *Allen* v. *McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), has settled most of the ground rules with respect to the preclusive effect of a state court judgment in a subsequent civil rights action in federal court. Traditional rules of preclusion are generally applicable in the cross-forum context. However, rules of preclusion and the mandate of 28 U.S.C. § 1738[9] can still be suspended under the *England* reservation mechanism or when the federal party against whom preclusion is asserted did not have a full and fair opportunity to litigate his federal claims in state court. *Id.* at 101 & n. 17, 101 S.Ct. at 418 & n. 17, 66 L.Ed.2d at 317 & n. 17; *see also Montana* v. *United States*, 440 U.S. 147, 163-64, 99 S.Ct. 970, 978-79, 59 L.Ed.2d 210, 223 (1979). Although both *McCurry* and *Montana* involved collateral estoppel, we are confident that the same exceptions apply to suspend application of res judicata in a federal civil rights action. We hold that a hybrid of the *England* and full-and-fair-opportunity exceptions requires that res judicata not apply in this case. This decision is based on federal law exceptions to both res judicata and the normal rule that a state court judgment's preclusive effect is determined by reference to the law of the judgment-rendering state.

We have already noted that the district court's promise to Howell that *England* offered a road back to federal court was not supported by the law. Nonetheless, that promise induced Howell to hold back his fed-

[9] 28 U.S.C. § 1738, the Full Faith and Credit Act, provides that the "judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken."

eral claims once he was relegated to state court. As a result, he could hardly be said to have had a full and fair opportunity to present his federal claims in state court even though such an opportunity was in theory present. Had Howell lodged his federal claims in state court, he would have forsaken the chance he had been offered to return to federal court. We are unwilling to punish Howell for his reliance on the federal district court's guidance.[9] His federal claims are not barred by res judicata.

IV

In sum, there is neither a jurisdictional nor a preclusive bar to Howell's presentation of his federal claims in federal court. Insofar as those bars have fallen, we reverse the district court's order of dismissal and remand this case to the district court for disposition on the merits.

REVERSED and REMANDED.

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[9]This opinion should not be construed as an endorsement of the type of "simple justice" or "public policy" exception to res judicata that the Supreme Court spurned in *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 399, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103, 110-11 (1981). The court in *Moitie* found *Reed* v. *Allen*, 286 U.S. 191, 52 S.Ct. 532, 76 L.Ed. 1054 (1932), to be controlling. In *Reed*, the court noted that the party trying to escape res judicata was in a "predicament . . . of his own making." *Id.* at 198, 52 S.Ct. at 533, 76 L.Ed. at 1056. On the contrary, Howell's predicament resulted from the district court's faulty ruling. Rather than carve out a "simple justice" exception to res judicata, we rely on a hybrid of the two exceptions (*England* and the full-and-fair-opportunity) expressly noted in *McCurry* and *Montana*.

US DISTRICT COURT, ND TEXAS, CHARLES BEN HOWELL v STATE BAR OF TEXAS, Et Al; No. CA-3-76-0280-C

[LETTER OPINION]
[Dated July 24, 1980; Not to be Published]

W. M. TAYLOR, JR., District Judge:

I have concluded that the State Bar's Motion to Dismiss should be granted.

It is clear to me that *Polk* v. *State Bar of Texas,* 480 F.2d 998 (5th Cir. 1973) is inapplicable. Not only because of footnote 11, but because it did not involve an attack on a state court judgment. I also do not believe that *England* v. *Medical Examiners,* 375 U.S. 411 (1968), is applicable. Plaintiffs there were told to file a lawsuit in state court for an authoritative construction of a state statute so that a constitutional claim would not be decided if the statute were construed in Plaintiff's favor. Plaintiff here was not the Plaintiff in the state court suit here and was not seeking the construction of a state statute. He was the Defendant in a case in which the Plaintiff there won an affirmative judgment against him. His constitutional claims were more of the nature of a compulsory defense in that suit. See *Moore* v. *Sims,* 442 U.S. 415 (1979).

[Not included in record by District Clerk; copied from Pet. Cert. No. 82-397, US S.Ct.; as filed by Respondents]

[ORDER OF THE SUPREME COURT]

[Filed April 4, 1983]

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. ____ (1983).

[JUDGMENT OF THE FIFTH CIRCUIT]

[Same judges, case name and numbering as before; filed August 1, 1983]

Appeal from the United States District Court for the Northern District of Texas

*** *** ***

JUDGMENT ON REMAND FROM THE UNITED STATES SUPREME COURT

This cause came on to be heard on remand from the Supreme Court of the United States;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-ment appealed from is affirmed in part; and reversed in part;

IT IS FURTHER ORDERED that costs be taxed equally against plaintiff-appellant and defendants-appellees.

[ORDER OF THE FIFTH CIRCUIT DENYING REHEARING]

[Same judges, case name and numbering as before; filed September 26, 1983]

[The office of the Clerk of the Court of Appeals advises that the only order of the Court on rehearing is contained within its Opinion on Rehearing; PA 8 *supra*]

[JUDGMENT OF THE DISTRICT COURT]

[Same district, judge, case name and numbering as above; filed Dec. 22, 1980]

The above-styled and numbered cause having come before the Court regularly to be heard and considered upon the briefs submitted to the Court and the argument of counsel for the parties upon the motion of the Defendants to dismiss; and it appearing to the court that such motion should be granted, it is accordingly

ORDERED that the Defendant's Motion to Dismiss Pursuant to Rule 12 be, and it is hereby granted, as to all Defendants and the Plaintiff's complaint is dismissed.

It is further ORDERED that the preliminary injunction heretofore entered by this Court on July 10, 1978, be, and the same is dissolved.

[R. 210]

[ORDER AND OPINION OF THE DISTRICT COURT DENYING REHEARING]

[Same district, judge, case name and numbering as above; filed January 13, 1981]

The Court having considered Plaintiff's Motion for Reconsideration under Rule 60 (b), F.R.C.P., of December 31, 1980, erroneously designated a Motion for New Trial, the response of Defendants, and the case of *Kimball* v. *The Florida Bar, et al*, ____ F2d ____, Slip Opinion p. 2168 (5th Dir., December 18, 1980), is of the opinion that Plaintiff's motion is without merit;

It is therefore ORDERED that Plaintiff's Motion for Reconsideration is denied.

[R. 216]

[ORDER OF THE DISTRICT COURT DENYING PRELIMINARY INJUNCTION]

[Same district, judge, case name and numbering as above; filed March 4, 1976]

Plaintiff's Motion for Preliminary Injunction was brought before the Court on March 1, 1976. After having heard and considered the affidavits of plaintiff and the oral and written argument of counsel, this Court is of the opinion that the preliminary injunction should be denied. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1974), *Younger* v. *Harris*, 401 U.S. 37 (1971). Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England* v. *Board of Medical Examiners*, 375 U.S. 411 (1964).

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Preliminary Injunction be and hereby is denied.

[R. 53]

NO. 83-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES BEN HOWELL, PETITIONER

V.

STATE BAR OF TEXAS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

BRIEF FOR RESPONDENT

IN OPPOSITION TO CERTIORARI

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit properly applied the holding of District of Columbia Court of Appeals v. Feldman, 103 S.Ct. 1303 (1983), to the case at bar and concluded that the district court lacked jurisdiction to decide all of the Petitioner's claims that were inextricably intertwined with the state court's decision. The Court of Appeals further correctly recognized that the England reservation did not apply in this case because this case is not a Pullman abstention case but instead is purely a Younger situation.

ARGUMENT

Introduction

The Fifth Circuit Court of Appeals' opinion of May 3, 1982, Howell v. State Bar of Texas, 674 F.2d 1027 (5th Cir. 1982) (PA 9), was vacated by the United States Supreme Court on April 4, 1983, and remanded for consideration in light of Feldman. 103 S.Ct. 1515 (1983) (PA 19).

In Feldman, this Court held that federal district courts have no authority to review final judgments of state courts in judicial proceedings but do have subject matter jurisdiction over general challenges to state bar rules promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a specific case. 103 S.Ct. at 1315-17. The Court noted that a party's failure to raise his

constitutional claims in state court does not bestow jurisdiction upon the federal court but in fact might result in the forfeiture of the party's right to review. Id. at 1315 n.16. The Court concluded, "[W]e expressly do not reach the question of whether the doctrine of res judicata forecloses litigation on [the general constitutional challenge] elements of these complaints." Id. at 1317.

Upon remand, the Fifth Circuit Court of Appeals recognized that Howell was calling upon the federal district court to review the state court judgment, which was beyond the federal court's power. 710 F.2d 1075, 1076-77 (5th Cir. 1983) (PA 3-6). The Fifth Circuit Court of Appeals next held, also in line with Feldman, that the federal district court did have subject matter jurisdiction over Howell's general constitutional attack on

the Texas' disciplinary scheme. The court then reinstated Part III of its prior opinion. Id. at 1078.

In Part III of the previous opinion, the Fifth Circuit rejected the State Bar's arguments that res judicata barred litigation in the federal court of claims that could have been raised in the state court. 674 F.2d at 1031. The Fifth Circuit Court of Appeals said that "rules of preclusion and the mandate of 28 U.S.C. § 1738 can still be suspended under the England reservation mechanism or when the federal party against whom preclusion is asserted did not have a full and fair opportunity to litigate his federal claims in state court." Id. (footnote and citations omitted). The court then held that "a hybrid of the England and full-and-fair opportunity exceptions requires that res judicata not apply in this case." Id. The court explained:

> We have already noted that the district court's promise to Howell that England offered a road back to federal court was not supported by the law. Nonetheless, that promise induced Howell to hold back his federal claims once he was relegated to state court. As a result, he could hardly be said to have had a full and fair opportunity to present his federal claims in state court even though such an opportunity was in theory present. Had Howell lodged his federal claims in state court, he would have forsaken the chance he had been offered to return to federal court. We are unwilling to punish Howell for his reliance on the federal district court's guidance. His federal claims are not barred by res judicata.

Id. (footnote omitted). In a footnote, the court asserted that its "hybrid" exception was not the same as the "simple justice" exception expressly rejected by the Supreme Court in Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 (1981). Howell, 674 F.2d at 1031 n.9. The court blamed Howell's predicament not on Howell but on the "faulty ruling" of the district court in its order of March 4, 1976, denying Howell's motion for a

preliminary injunction to enjoin the state disciplinary action. Id.

In spite of this Court's order of April 4, 1983, 103 S.Ct. 1515, remanding this case to the Fifth Circuit Court of Appeals for further consideration in light of Feldman (PA 19), and in spite of the fact that the Fifth Circuit Court of Appeals has remanded this case to the district court for disposition of the merits of Howell's general constitutional challenge to Texas' disciplinary procedure (PA 7-8), Howell now petitions this Court, arguing that Feldman is inapplicable and that he preserved full federal review by invoking an England reservation.

England is not Applicable to This Case

Contrary to the primary thrust of Howell's arguments, this case is not an England abstention case. It instead properly falls into the Younger line of

cases, as recognized by the district court in its letter opinion of July 24, 1980 (PA 18); see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 102 S.Ct. 2515 (1982).

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 417 (1964), clearly stemmed from Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). England, 375 U.S. at 423 (Douglas, J., concurring). Justice Douglas noted in his concurring opinion that there are many occasions when federal courts abstain, dismissing actions such as suits to enjoin criminal prosecutions. He wrote: "[Pullman] is a different kind of case. There the federal court does not abstain; it does not dismiss the complaint; it retains jurisdiction while the parties go to a state tribunal to obtain a preliminary ruling--a declaratory judgment--on state law questions." Id. In England, the plaintiffs

were graduates of chiropractic schools who could not meet the requirements of the state medical practice act. They filed suit in federal district court seeking an injunction and a declaration that the state statute as applied to them violated the Fourteenth Amendment. The district court invoked the abstention doctrine and sent the plaintiffs to the state's courts to get a ruling on the act. Id. at 412-13.

The factual background in England differs sharply from that of the case at bar and brings into clear focus the inapplicability of England to this case. Here, the state disciplinary suit was already in progress when Howell sought to enjoin the state proceedings in federal district court. The federal court properly denied Howell's motion for a preliminary injunction pursuant to Huffman v. Pursue, Ltd., 420 U.S. 592 (1974) and

Younger v. Harris, 401 U.S. 37 (1971) (PA 22). (The court then held out the mistaken promise of an England reservation which has resulted in the present, continuing litigation.)

Younger's application to this case is impossible to dispute. The Supreme Court has held that Younger principles specifically apply to attorney disciplinary proceedings. Middlesex County Ethics Comm., 102 S.Ct. at 2521-24.

The federal district court ultimately dismissed this case on Younger principles as extended to civil proceedings in Moore v. Sims, 442 U.S. 415, 423 (1979) (PA 18). The district judge recognized in his letter opinion of July 24, 1980, that England did not apply:

> [The England] Plaintiffs . . . were told to file a lawsuit in state court for an authoritative construction of a state statute so that a constitutional claim would not be decided if the statute were construed in Plaintiff's favor. Plaintiff here [Howell] was not the

> Plaintiff in the state court suit . . . and was not seeking the construction of a state statute. He was the Defendant in a case in which the Plaintiff won an affirmative judgment against him. His constitutional claims were more of a compulsory defense in that suit. See Moore v. Sims, 442 U.S. 415 (1979).

(PA 18).

Howell places great emphasis on the fact that he was in state court "against his will," claiming such as a key distinction between this case and Feldman. However, Younger and its progeny concern situations in which the federal plaintiffs also were in state court "against their will." Such factor does not affect the Supreme Court's clear mandate that the pertinent inquiry is whether the state proceedings afford adequate opportunity to raise constitutional claims. Middlesex County Ethics Comm., 102 S.Ct. at 2521; see also Moore v. Sims, 442 U.S. at 430 n.12.

Feldman directs that where litigants seek review in federal district court of issues inextricably intertwined with a state court judgment, the federal district court lacks subject matter jurisdiction over the claims. 103 S.Ct. at 1315. Adhering to Feldman, the Fifth Circuit Court of Appeals stated, "A district court's erroneous interpretation of the law, even when combined with a litigant's asserted reliance on the error, cannot create jurisdiction where it would not otherwise exist." Howell, 710 F.2d at 1078. In other words, abstention where no subject matter jurisdiction exists reserves nothing.

Feldman expressly applies to attorney disciplinary cases. The Court notes the importance of recognizing the strength of the state interest in regulating the state bar and quotes with approval MacKay v. Nesbett, 412 F.2d 846

(9th Cir. 1969): "Orders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court . . . ." 103 S.Ct. at 1315-16 n.16 (emphasis added). Howell's contentions belie this Court's express authority otherwise.

Finally, Howell has been awarded his day in federal district court to hear his general constitutional attack on DR 1-102(A)(5) of the Texas Code of Professional Responsibility. If the Fifth Circuit Court of Appeals committed any error in its reconsideration of this case, it was in refusing to apply res judicata to foreclose litigation of this one remaining claim, the only question left open by the **Feldman** decision.

CONCLUSION

Feldman controls this case and reiterates the long-standing rule that federal district courts cannot sit in direct review of state court judgments. The federal district court's promise of an England reservation of federal claims was erroneous and could not create jurisdiction where it never existed.

The Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

Jerry L. Zunker
General Counsel
State Bar of Texas

CERTIFICATE OF SERVICE

I, Jerry L. Zunker, counsel of record for Respondent and a member of the Bar of this Court, do hereby certify that on this 30th day of March, 1984, three copies of the above and foregoing Brief for Respondent were served by mail on Tom Scott McCorkle, Jr., 500 Katy Building, 701 Commerce Street, Dallas, Texas 75202, counsel of record for the Petitioner.

Jerry L. Zunker